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CURRENT TOPICS

Deaths of Judges

WE record with regret the death of His Honour Judge HENRY ST. JOHN FIELD, K.C., on 9th December, at the age of sixty-six. The late judge was appointed as recently as 1943 to the Leicester circuit, and many solicitors remember him as a busy and an unusually learned junior and, after 1936, leader. His training as a pupil and later as a devil with Henry McCardie (later McCardie, J.) stood him in good stead, and his knowledge of law was as profound as his advocacy was able. His Honour FRANK SHEWELL COOPER, whose death on 6th December we also regret, had retired from his assistant judgeship at the Mayor's and City of London Court in 1936, at the age of seventy-two, having held the office since 1922. From 1917 to 1922 he was deputy stipendiary magistrate at West Ham.

Sir George Etherton

ONE of the highest authorities on local government law, the late Sir GEORGE HAMMOND ETHERTON, O.B.E., died at the age of 73 at the beginning of December. He was admitted as a solicitor in 1902. Not long after his admission he became Deputy Town Clerk of Woolwich. From then until 1922, when he became Clerk to the Lancashire County Council, his path was one of steady progress to higher appointments in local government. He held his last appointment until 1944. From 1935 to 1944 he was Chairman of the Society of Clerks of the Peace of Counties and Clerks of County Councils. In 1921 he was a member of Lord Newton's Departmental Committee on the Rivers Thames and Lea and also a member from 1930 to 1947 of the Railways Assessment Authority. In 1942 the Minister of Works and Planning appointed him to the advisory panel of the Ministry. After his retirement he served on the War Damage Commission and the Requisitioned Land and War Works Commission, and was an original member of the Central Land Board. He retired from these bodies in 1948.

Legal Aid: Part Operation in July, 1950

IN answer to a question in the Commons by Lt.-Col. LIPTON on 12th December, the ATTORNEY-GENERAL has now stated that the part of the Legal Aid and Advice Act which has not been deferred, namely, that part of the scheme which deals with litigation in the High Court, will be introduced in or about July next year, which is the time originally planned for the coming into effect of the full scheme. Sir Hartley Shawcross made it clear that it would not be practicable in the interim to raise the existing maximum income limit of £4 for applicants under the Poor Persons Rules, since The Law Society could not both reorganise their present arrangements for that purpose and plan for the new scheme so as to be able to administer it by that date.

The Lands Tribunal

THE issue on 12th December of the Lands Tribunal Rules, 1949, which are expressed to come into operation on 1st January, 1950, foreshadows the making of an Order in Council in the near future to bring the Lands Tribunal Act, 1949, into full operation at the beginning of next year. The new Rules (S.I. 1949 No. 2263) lay down the detailed procedure on appeals to the tribunal against determinations by Government departments or authorities, on appeals to the tribunal from local valuation courts in rating cases under the Local Government Act, 1948, on references of questions and disputes to the tribunal, and on applications to the tribunal under s. 84 of the Law of Property Act, 1925, for the discharge or modification of restrictive covenants. One of the many interesting provisions of the rules is that conferring a power on the tribunal to select a test case from two or more rating appeals which appear to the president of the tribunal to involve the same point or points of law. Decisions of the tribunal will be given in writing, together with a brief statement of the reasons for the decision.

Apportionment of Claims on £300,000,000 Fund

AN announcement by the Central Land Board, reported in the December issue of the *Law Society's Gazette*, states that they cannot recognise apportionments of claims on the £300,000,000 fund, e.g., on a sale of part of the property in respect of which a claim has been submitted. Any sharing of the ultimate payment, they state, is a matter for the parties themselves, and it would probably be advisable to include in any contract of assignment clauses determining the proportion in which any payment from the £300,000,000 fund is to be shared.

Banker's Draft in favour of Purchaser's Solicitor

THE Council of The Law Society answer an important query on conveyancing practice in the December issue of the *Law Society's Gazette*. They were asked whether a vendor's solicitor need accept a banker's draft drawn in favour of a purchaser's solicitor endorsed by him and crossed "not negotiable." The answer is that he need not, because if the draft is so crossed, the vendor's solicitor cannot obtain a better title than that of the purchaser's solicitor and is

therefore entitled to raise objection. In the absence of a prior agreement, therefore, the purchaser's solicitor should either see that the draft is drawn in favour of the vendor's solicitor or arrange with the issuing bank not to add the words "not negotiable."

Building Societies and Compulsory Registration

THE opinion of the Council of The Law Society is also expressed in the same issue of the *Law Society's Gazette* that a solicitor acting for a borrower from a building society cannot reasonably be expected to give an unqualified undertaking such as "we personally undertake that we will comply with all the requirements of the Land Registry, preliminary to such registration, to the intent that you shall in due course receive from the Land Registry the usual certificate showing the registration of the mortgagor as such proprietor." Some building societies' solicitors seek to obtain such an undertaking, but the Council holds that it should not be insisted upon. The normal undertaking is a qualified one that the borrower's solicitors shall use their best endeavours to comply with the requirements of the Land Registry upon first registration. The Council states that an alternative procedure is for the purchaser's solicitors to deliver all the documents of title to the building society's solicitors on completion, together with the necessary form of application for registration.

New Land Registry Fee Stamp

THE Chief Land Registrar has announced that, in order to facilitate the payment of small fees, arrangements have been made with the Post Office for the introduction of a 2s. 6d. Land Registry adhesive stamp in addition to the 6d., 1s., 1s. 6d. and 2s. denominations at present in use. The new stamp will be generally available at post offices within a week or so.

Justices' Clerks: Admission as Solicitors without Articles

AN important and interesting Government amendment to the Justices of the Peace Bill was accepted by the Commons on the Report stage on the 13th December. As is well known, the Bill provides that after the 1st January, 1960, appointments to the office of justices' clerk shall be open only to professionally qualified lawyers, and two difficulties inherent in this proposal had to be met: (*a*) from whence are such qualified clerks to be obtained, and (*b*) what is to become of the present assistants in the offices of unqualified clerks, who may be perfectly capable of qualifying as solicitors but who are debarred from serving their articles because they are not employed by a solicitor? The new amendment, which the HOME SECRETARY said had been discussed with "leading members of The Law Society," provides that a person who has served not less than ten years (including five years before 1st January, 1960) as an assistant to a justices' clerk, and who obtains from The Law Society a certificate of approved service under the provision, may be admitted a solicitor notwithstanding that he has not been bound by and served under articles. It is a pity that such a weighty question had to be dealt with in such haste owing to the impending end of the Parliamentary session—indeed, the Home Secretary revealed that the Council of The Law Society would not be formally apprised of the amendment until the 16th December—and there will be some sympathy with those members who expressed some apprehension at this novel departure.

Local Authorities' Meetings

ON 5th December the Consultative Committee on Publicity for Local Government, consisting of representatives of the Ministry of Health and of the local authority associations, formed in 1946, published a summary of the views of nearly 700 local authorities on Press relations. In 1947 the committee issued an interim report and recommendations. Nearly thirty authorities said they admitted the Press even to committee meetings, and several said this had stimulated public interest in council affairs. Some thirty-three authorities said they issued statements to the Press immediately after committee meetings, and several pointed out that this secured more publicity than if the Press information were limited to the day of the council meeting. One authority said that it was not the council's policy to deal with all matters in public because some councillors felt that they had not the same freedom of expression as when in committee. More than 100 authorities said they issued the agenda and accompanying documents to the Press in advance of council meetings, but there was some disagreement on whether there should be advance editorial comment. One authority, while not objecting to advance publication of reports, thought that editorial comment, which might not represent the opinions of ratepayers, might be prejudicial to the subsequent debate in council. Another authority argued that prior comment by the Press enabled matters of public interest to be well ventilated before the council came to a decision. The summary demonstrates that local government has still not attained the full democratic publicity that is considered essential to the workings of both Parliament and the courts.

The London Police Court Mission

FOUNDED in 1876 to provide in London courts the first Police Court Missionaries, the London Police Court Mission became the pioneers of the probation service in this country. Relieved in 1936 of the responsibility of appointing missionary probation officers and of paying part of their salaries and expenses, the Mission was able, at the invitation of the Home Secretary, to undertake work which included the extension of residential facilities for the character training and education of young offenders; the establishment of a hostel in which candidates for the probation service might reside for part of their training and the provision of all means, including spiritual help, to assist probation officers in their work. The Mission's annual report for 1948–49, which has recently been published, shows in detail the wide scope of the work now being undertaken at its schools and homes and in its guild and assistance department. For example, over the past eight years The Cotswold School in Wiltshire has trained 475 boys and 87 per cent. of them are doing well, and the Hampstead and North London Women's Shelter received 225 women and girls including five mothers and their babies, in the last twelve months. The guild and assistance department helped 955 persons in 1948–49, provided 1,650 garments, and disbursed £922. The year was ended with a deficit, and an increase in subscribers. legacies and covenanted subscriptions is needed. The chairman of the Mission is Mr. DINGWALL L. BATESON, C.B.E., M.C., solicitor, and the Mission's headquarters are at 2 Hobart Place, Eaton Square, London, S.W.1.

Recent Decisions

In *Re a Debtor*, on 5th December (*The Times*, 6th December), a Divisional Court (ROMER and HARMAN, JJ.) held that a sum due in respect of unpaid rates was a good debt on which to base a bankruptcy petition, notwithstanding that no action could be brought to enforce an unpaid debt for rates. The court added that it had been held in *Re North Bucks Furniture Depositories, Ltd.* [1939] Ch. 690, that a local authority could present a petition to wind up a company on account of unpaid rates, that company legislation was exactly parallel to bankruptcy and it would be a lamentable anomaly if there should be differences as to what constituted a good petitioning creditor's debt.

In the Court of Criminal Appeal (the LORD CHIEF JUSTICE and CASSELS and PRITCHARD, JJ.), on 5th December (*The Times*, 6th December), the court allowed the appeal of a person convicted of receiving stolen property and quashed his conviction and sentence of three years' imprisonment on the ground that the Recorder who tried the case with a jury had sent a note from his private room in reply to a question sent by the jury in its retirement. The court held that no communication between judge and jury, even on an unimportant matter, was permissible which did not take place in the prisoner's presence.

THE RULE IN *RE ATKINSON* AND STOCK EXCHANGE SECURITIES

THE rule of equity generally named after the decision in *Re Atkinson* [1904] 2 Ch. 160 provides that where trust moneys forming part of a settled fund are invested upon an authorised security which on realisation proves insufficient for the payment of principal and outstanding interest, the sum realised ought to be apportioned between the income and capital of the fund in the proportion which the amount due for arrears of interest bears to the amount due in respect of the capital debt. Although the rule is so named, the decision in *Re Atkinson* was by no means the first in which the principle of apportioning the proceeds of insufficient securities was applied. Its real effect was to set at rest a doubt as to the correct mode of apportionment and to establish that, in apportioning the proceeds of an authorised security which has proved insufficient, any interest actually received by the life tenant need not be brought into hotchpot before ascertaining the proportion of the proceeds due to him in respect of arrears of interest.

There is, perhaps, a tendency to regard this rule as applying, primarily if not exclusively, to specific mortgages of property and in fact the case of *Re Atkinson* itself and most of the previous cases reviewed there dealt with mortgages of land. But the principle of the rule does not seem to be concerned with the precise form of the security or the nature of the property comprised in it. The principle is broadly stated by Vaughan Williams, L.J., in *Re Atkinson*, at p. 165, in these terms: "There being a security for principal and interest and there having been a loss, one must take care that there is rateable equality in the incidence of that loss." Thus stated it would seem capable of applying to any form of investment which does in fact provide a security for interest and principal, and this description will include various classes of security commonly dealt with on stock exchanges, such as bonds, debentures and debenture stocks.

Dicta in favour of applying the *Atkinson* rule in proper circumstances to the proceeds of realisation of a bond or debenture stock are to be found in the judgments of Buckley, J., in *Re Taylor* [1905] 1 Ch. 734, at p. 737, and of Swinfen Eady, L.J., in the Court of Appeal in *Re Pennington* [1914] 1 Ch. 203, at p. 212, though in each of these cases the court decided against apportionment on the particular facts. And in *Re Walker* [1936] Ch. 280, the rule was positively applied to a sum received on account of principal and arrears of interest on a debenture stock in the liquidation of the Sand Hutton Light Railway Company. It was argued that the sum recovered should be applied first in satisfying the arrears of interest and not apportioned rateably between income and capital, on the ground that the stock, being issued subject to the provisions of the Companies Clauses Act, 1863, was primarily a security for the payment of interest indefinitely, there being no specific remedies for securing repayment of principal and apparently no date fixed for such repayment. Farwell, J., however, while admitting that no mortgage was involved, held that there was nothing to take the case out of the *Atkinson* rule and that the sum should be apportioned accordingly. The fact that the stock, having been issued privately to trustees, was not quoted on any exchange would hardly exclude similar quoted stocks from the scope of this decision.

It is thus fairly well established that the *Atkinson* rule is capable of applying to the proceeds of realisation of debenture stocks and similar securities, if they do in fact secure the payment of interest and principal, or the payment of interest permanently, and provided that they are authorised investments in the trust. On the other hand the actual decision of Buckley, J., in *Re Taylor, supra*, make it clear that the rule will not apply where the payment of interest is not, or has not become, a definite obligation. In this case under the terms of the bonds in question, interest was only payable out of profits as and when earned, though it was cumulative. At the time the stock was sold, the profits had been insufficient to pay the full rate of interest for some years, so that the company had not become a debtor for any amount beyond that which had been actually paid out of profits. It was therefore held that the tenant for life had no claim to any apportionment of the proceeds of sale of the bonds in respect of unpaid interest, and that the whole must be treated as capital. It follows *a fortiori* from this decision that there can be no case for applying the *Atkinson* rule in respect of preference shares with dividend in arrear at the time of realisation. The later decisions in *Re Sale* [1913] 2 Ch. 697, and *Re Wakley* [1920] 2 Ch. 205, emphasised the fact that no right to the payment of preference dividends accrues until profits have been earned out of which they can be paid and which the company has determined to distribute.

It might possibly be argued that there is a further important limitation on the application of the *Atkinson* rule to stock exchange securities, for it is not entirely clear whether it applies to a realisation by sale of the bond or debenture itself, as distinct from a realisation through sale of the property charged or payment by the debtor in liquidation or bankruptcy. Buckley, J., in *Re Taylor, supra*, was dealing with a case of sale of bonds, and indicated that if they had actually been a security for the interest unpaid, he would have regarded the rule as applicable to the proceeds. Apart from this brief *dictum* there appears to be no direct authority on the point, for naturally in all the cases dealing with mortgages of land realisation was by way of sale of the property charged, while *Re Walker, supra*, the only positive decision applying the rule to a debenture stock, was concerned with a payment in liquidation. *Re Pennington, supra*, also dealt with a scheme in liquidation.

The main ground for the suggestion that the rule may not apply to the proceeds of sale of stock exchange or similar securities is that in a long line of decisions from *Scholefield* v. *Redfern* (1863), 2 Dr. & Sm. 173, to *Re Firth* [1938] Ch. 517, and *Re Henderson* [1940] Ch. 368, the court has decided (as a general rule with occasional exceptions) against allowing the life tenant any apportionment when an investment is sold cum accruing interest or dividend, and at first sight it might seem likely that the same principle would be extended to the sale of a debenture cum accrued interest in arrear. In *Re Firth, supra*, one at least of the securities in question was in fact a debenture stock with interest in arrear—i.e., the 4 per cent. debenture stock of the Leopoldina Railway mentioned at p. 519—and this was included with the rest in the order directing no apportionment of the proceeds of sale to be made. There is no indication, however, that the special position of this stock was discussed and the judgment related entirely to the question of sales cum current accruing dividends, so that the case can hardly be regarded as an authority on sales cum arrears of accrued interest.

On the other hand accrued but unpaid interest (as well as a dividend declared but not yet paid) being a debt differs in kind from interest or a dividend merely accruing at the time of sale—a distinction which was recognised in *Re Peel* [1910] 1 Ch. 389. Moreover the main ground for the refusal of apportionment in the *Scholefield* v. *Redfern* line of cases was the burden which would be cast upon trustees by the duty of apportioning in the life tenant's favour the proceeds of sales cum dividend with the corresponding duty of apportioning against him dividends received on investments purchased cum dividend, and the difficulty in many cases of making a correct apportionment. These considerations would hardly apply to apportionment under the *Atkinson* rule of the proceeds of sale of securities with interest in arrear. Such sales by trustees, though not very rare, are not such everyday occurrences as ordinary cum dividend sales or purchases, and the apportionment should be free from essential difficulty if the amount of interest due and unpaid is clear, as it should be in normal cases. (Admittedly, however, difficulty may occur in ascertaining the outstanding interest if the security

realised has been subject to one or more complicated schemes of arrangement, the effect of which on outstanding claims for interest may not be very clear. Such schemes seem to be especially popular with foreign governments and companies.)

On the whole, therefore, the case for applying the *Atkinson* rule to the proceeds of sale of stock exchange securities (in the true sense) with interest arrears remains fairly strong, and it would seem difficult to deny its application to this mode of realisation while admitting its application to other modes of realisation (e.g., payments in liquidation) of the same type of securities. But the point can hardly be considered free from doubt, and a decision of the court thereon would be welcome, for in this disturbed century the number of securities with interest in arrear is relatively large, and the question whether trustees should apportion the proceeds of sale of such investments may not infrequently affect the destination of considerable sums of money.

H. B. W.

Company Law and Practice

ACKNOWLEDGMENTS UNDER THE STATUTE OF LIMITATIONS

THE extent to which the publication of figures in the balance sheet of a company may constitute an acknowledgment of a debt to a creditor for the purposes of the law of limitations has again in recent months come before the court for consideration. In *Jones* v. *Bellegrove Properties, Ltd.* (1949), 93 SOL. J. 149 and 512, the King's Bench Division and the Court of Appeal were called upon to decide whether the entry of an item, "Sundry Creditors, £7,638 8s. 10d.," in several successive balance sheets constituted such an acknowledgment. On the facts of this case (see below) it was held that the entry did amount to an acknowledgment.

It may seem at first sight that this decision is one of major importance as an authority upon which creditors and companies may rely in prosecuting a claim or in pleading the Statutes of Limitation, and there appears to be some danger, despite the warning given by Lord Goddard, C.J., in his judgment in the Court of Appeal, that it may be taken as an authority for the proposition that all statements of debts in balance sheets may amount to an acknowledgment by the company of the debt to all creditors concerned. It may therefore be of some interest and value to practitioners to stop and consider the effect of this decision upon existing law.

From a glance at the subsisting authorities, it emerges that in each case it must be determined whether the entry in the balance sheet or the document concerned is a mere statement of fact, or whether it does amount to an acknowledgment. For instance, in *Bowring-Hanbury's Trustee* v. *Bowring-Hanbury* [1943] Ch. 104, a creditor who was the sole executor of his wife's will included in an Inland Revenue affidavit made by him a debt due to himself by her estate. The creditor subsequently became bankrupt, and the solicitors, who were acting for him as executor of his wife's estate, sent to his trustee in bankruptcy a copy of the executor's cash accounts and an estimate of the outstanding assets and liabilities of the estate. A note was appended to this document by the solicitors to the effect that, in addition to the outstanding liabilities, there was a possible claim by the executor against his wife's estate. The Court of Appeal held, following *Re Beavan* [1912] 1 Ch. 196, that the statement in the Inland Revenue affidavit was a mere statement of fact and that, as the solicitors had no authority to append the above-mentioned note, there was no acknowledgment. A similar conclusion was reached by Maugham, J. (as he then was), in *Re Coliseum (Barrow), Ltd.* [1930] 2 Ch. 44. In this case the company had been making trading losses and the directors had waived their fees for a number of years. In the company's annual balance sheets, signed by two of the directors, there was an entry of the amounts due to the directors as fees. The balance sheets were presented to the shareholders and duly passed by the company. It was held that these entries did not amount to acknowledgment by the company of the debts due to the directors. The reasons for this decision were clearly put by Maugham, J., in his judgment: "It is now well settled that an acknowledgment will keep a debt alive only if it amounts to a fresh promise to pay (*Green* v. *Humphreys* (1884), 26 Ch. D. 474) and the acknowledgment must be made to the creditor or his agent; that is beyond dispute . . . Having regard to the position which a director . . . necessarily occupies in relation to the company, it would not have been competent action to the board, acting as a board, to authorise the giving of a definite promise to pay themselves. They would all have been interested in the matter, and so would have been incapable of passing the resolution so as to bind the company."

On the other hand, in *Re Atlantic and Pacific Fibre Importing and Manufacturing Co.* [1928] Ch. 836, a company's balance sheet contained a statement as to the total indebtedness of the company for principal and interest accrued on its debentures since their issue. It was held that this entry constituted a sufficient acknowledgment of the debt to all debenture-holders even though they did not receive a copy of the balance sheet. It must be observed that this case was decided on s. 3 of the Civil Procedure Act, 1833, under which it was not necessary (in the case of a specialty debt) for the acknowledgment to be made to the claiming creditor. The Limitation Act, 1939, s. 24, now provides, *inter alia*, that an acknowledgment must be in writing and signed by the person making it. The acknowledgment may be made by the agent of the persons by whom it is required by s. 23 to be made, and must be made to the person, or to an agent of the person, whose title or claim is being acknowledged. Thus it appears that if *Re Atlantic and Pacific Fibre Importing and Manufacturing Co., supra*, had been decided after the Limitation Act, 1939, came into force, the entry in the balance sheet would only have amounted to an acknowledgment to those debenture-holders who had received copies of the balance sheet from the company.

Returning to *Jones* v. *Bellegrove Properties, Ltd., supra*, the facts were briefly as follows: In 1936 the plaintiff lent the defendant company a sum of money, which he sought to recover by means of the action. The defendant company pleaded the Statute of Limitations and the plaintiff answered this plea by the claim that the balance sheets for the years 1939, 1940, 1941, 1942, 1943 and 1945 contained a statement, "Sundry Creditors, £7,638 8s. 10d.," and these balance sheets were presented to him, signed by the company's auditors, at a general meeting in 1946. There was parol evidence on the part of one of the defendants' witnesses that the plaintiff's debt was included in the said statement. It was held (following *Read* v. *Price* [1909] 2 K.B. 724) that this parol evidence was inadmissible, that ss. 23 and 24 of the Limitation Act, 1939, were satisfied, and that the entry did amount to an acknowledgment of the plaintiff's debt. In the course of his judgment, however, Lord Goddard, C.J., gave this warning: "The case may appear to have some general importance with regard to the ability of companies to rely on the Limitation Act, 1939, but it really depends on its own facts and I wish to make it clear that our decision is based on those special facts . . ."

The question has been raised as to whether the law of limitation relating to the payment of unclaimed dividends is altered by the decision in *Jones* v. *Bellegrove Properties, Ltd.* A dividend, when declared, is a debt owing by the company, and as it is a specialty debt the limitation period is twelve

years. The early authorities, which lay down that a company is not a trustee for its shareholders to see that the limitation period does not run, hold good (*Smith* v. *Cork and Bandon Railway Co.* (1870), Ir.R. 5 Eq. 65, at p. 75; *Re Severn and Wye and Severn Bridge Railway Co.* [1896] 1 Ch. 559; Limitation Act, 1939, s. 2 (3)). There is, however, no magic in an unclaimed dividend and there seems to be no reason why it should not be treated as any other specialty debt.

From this brief review of the authorities, then, it emerges that *Jones* v. *Bellegrove Properties, Ltd., supra*, has had no profound effect upon the existing law as to what entries in balance sheets or other documents constitute an acknowledgment. In a parallel case *Jones* v. *Bellegrove Properties, Ltd., supra*, will be a useful authority, but apart from this each case must be decided on its own merits as a question of construction.

N. P. M. E.

Costs

SCHEDULE II

WE noticed briefly last week that Sched. II of the General Order, made pursuant to the Solicitors' Remuneration Act, 1882, provides a basis of remuneration in respect of certain specified business, other than completed sales, purchases, mortgages and leases.

Rule 2 of the order provides, *inter alia*, for remuneration in respect of business connected with "matters of conveyancing, and in respect of other business, not being business in any action . . ." It is sometimes suggested that the case of *Stanford* v. *Roberts* (1884), 26 Ch. D. 155, decided that Sched. II applied only to conveyancing business. This is not so, however. What that case did decide was that the scale laid down in the order applied to conveyancing business, whether that business arose in the ordinary way, or whether it arose in an action.

This point was made clear in the case of *Re R. P. Morgan and Co.* [1915] 1 Ch. 182, where the principle was quite definitely laid down that Sched. II applied not only to conveyancing business, but also to all other business not being business in an action and not being contentious business. All other business must, of course, mean all other business except business for which a special scale is provided, as, for example, in the case of non-contentious probate business.

There is not much difficulty in deciding what is business in an action and which also is not conveyancing business. There is, however, some obscurity about the term "contentious business." When does business come within the scope of the term? It is quite clear that Sched. II is intended to cover something more than conveyancing, and, indeed, this point was emphasised in the case of *Re R. P. Morgan & Co., supra*, for it was there held that the drawing of a case to counsel to advise as to the question of contemplated litigation was not to be regarded as contentious business.

Thus, if a dispute between two parties arises, and a solicitor is asked to advise one of them, then the remuneration for that advice will be based on Sched. II. He may take counsel's opinion as to the prospects of prosecuting or contesting the claim, and the business is still not contentious. He may even engage in negotiations in an endeavour to settle the difference, and this is still not contentious, for it is merely a variation or extension of the solicitor's advisory activities. A point is reached, however, when negotiations become abortive and each party takes a firm stand. This seems to be the point at which the business becomes contentious, and the moment when this point is reached is normally that at which the difference is handed over to a third party for determination. The third party may be the court or a judge, in which case the business definitely passes outside the scope of the General Order; or the third party may be an arbitrator agreed upon by the parties or otherwise appointed. In this case the business again passes outside the scope of the General Order, for it has become actively contentious.

The real test as to whether any particular business is within the scope of the General Order, therefore, is to decide in the first place whether it is business, not being conveyancing business, in any court or in the chambers of any judge or master. If it is, then the General Order certainly does not apply. If, however, it is not such business, then the next question to decide is whether the business possesses any of the characteristics of litigious controversy. Is the business, although not part of an action, nor conducted in court or in the chambers of a judge or master, conducted on lines parallel with an action? If it is then it seems that it must be regarded as contentious business so as to take that business outside the scope of the General Order.

So far as can be ascertained there is no judicial guidance on this very moot point, but the principles stated above appear to be those implicit in the order, and afford a reasonably clear guide as to what business is and what is not included in the scale remuneration laid down therein.

We dealt in our last article with the charges normally allowed in respect of drawing and perusing documents. A fee of 10s. "in ordinary cases" is allowed under Sched. II in respect of attendances. In itself this is not very helpful because the term "ordinary cases" lends itself to widely different interpretations, according to the skill or knowledge of the person concerned, whilst no hint is given as to the time which the solicitor is expected to spend on an attendance for which he is to be remunerated with the sum of 10s.

It is submitted that the term "ordinary cases" is intended to mean ordinary cases met with in a solicitor's general practice. If the solicitor specialises in any particular branch of the law, and is consulted in his capacity of a specialist or expert, then that would not be an ordinary case, with the result that the charge should be such as is commensurate with his professional standing and knowledge. On the other hand, cases can readily be visualised where an attendance may well be described as "sub-ordinary," and in these cases something less than 10s. must obviously be charged. For example, an attendance of two or three minutes' duration to reply to a simple question without any legal significance could hardly be regarded as an ordinary case.

So far as the duration of the attendance is concerned, little can be gleaned from the order. We find a little later in the scale authority for an allowance of five guineas a day of not less than seven hours employed on business or travelling, or for any less time than seven hours at the rate of 15s. per hour. From this one may infer that the allowance of 10s. for an attendance is intended to cover a period of about forty minutes. Notwithstanding this, it is understood that the Council of The Law Society has expressed the view that a client is entitled to a conference of one hour's duration for the fee of 10s. If this be so, then such an allowance appears to be somewhat inconsistent with the allowance to which reference has just been made in respect of journeys away from home; bearing in mind, moreover, that during the journey, for which the solicitor is entitled, according to the scale in Sched. II, to be remunerated at the rate of 15s. per hour, he could occupy his time in perusing and drafting documents in other matters.

Be that as it may, the allowance is generally interpreted to mean an attendance of not more than one-half an hour's duration, and even a fifteen minutes' attendance normally warrants a charge of 10s. The scale was fixed at a time when telephones were not an integral part of the business system, so that it may safely be inferred that when the allowance of 10s. for an attendance was fixed it was not contemplated that many attendances and, indeed, important ones, might, as at the present time, be made through the medium of the telephone. There seems to be no good reason, therefore, why the charge by a solicitor for a telephone attendance should not be made on the same scale as that applicable to a personal attendance. The duration of the attendance, and the importance or otherwise of the conversation will, of

course, be relevant factors to take into consideration, as they are in the case of personal attendances.

In those cases where the charge for drawing an abstract of title is not covered by the scale remuneration under Sched. I, the charge will be made under Sched. II at the rate of 6s. 8d. for each brief sheet of eight folios, and the charge for copying will be 3s. 4d. for each similar sheet. Ordinary fair copying is allowed at the rate of 4d. per folio, and the increased allowance of 5d. per folio for abstracts is to compensate for the additional trouble involved in copying the document in columnar form. We have already seen that the charge of 1s. per folio for perusing, allowed under Sched. II, does not apply to an abstract of title (*Re R. A. Parker* (1885), 29 Ch. D. 199), and the old charge of 6s. 8d. for three brief sheets of eight folios each will, therefore, continue to be charged.

The allowance under Sched. II for engrossing "deeds, wills and other documents" is 8d. per folio. The words "other documents" are governed by the *ejusdem generis* rule and mean other documents similar to deeds and wills. In short, the allowance of 8d. for engrossing will apply to any document which has to be executed. The allowance for fair copying documents under Sched. II is 4d. per folio, but this clearly means ordinary fair copies. No allowance is made for certified or attested copies, and the charge for these copies must be made according to the old system, namely, at 6d. per folio.

A notable omission from Sched. II is an allowance for letters, and here again reference must be made to the old system. The normal allowance for a letter is 3s. 6d., although in the Taxing Office an allowance of 5s. is made for a special letter. Quite obviously, this is totally inadequate for many letters that are written, and it is customary, in practice, to charge for an opinion letter at the same rate as is allowed under Sched. II for drawing a deed or other similar document, namely, 2s. per folio. Telegrams are allowed at 5s., to cover the additional labour of despatch; and a similar charge is normally allowed for registered letters. None of these items is included in Sched. II.

J. L. R. R.

LOCAL GOVERNMENT NEWS—VII

Reform of the Local Land Charges Register

A number of contributors to legal periodicals have now advanced views as to the reform of the local land charges register. In the columns of this journal (p. 475, *ante*) R. N. D. H. has dealt exhaustively with some of the problems which must be faced by the committee set up to consider the registration of prohibitions of or restrictions on the user of land. It seems likely that there may be a recommendation that the registers kept by county councils at present should be merged with those kept by boroughs and district councils; it has also been suggested that in addition to a reduction in the number of authorities keeping registers there should be a reduction in the number of separate registers. There should, in other words, be only one register and one official search to take the place of the many registers at present maintained, some of which form part of the local land charges register and some of which do not. It also seems clear that by a comprehensive and planned system of registration of prohibitions and restrictions many of the "additional inquiries" made in connection with conveyances on sale could be avoided.

The purpose of this note is to draw attention to one of the committee's terms of reference which often seems to be overlooked. This reads:—

> "Whether legislation should be introduced for the purpose of imposing upon persons proposing to dispose of their interests in land the obligation of disclosing to prospective purchasers of such interests any such matters as are referred to in paras. 1 and 2 of which they have notice."

The general tendency of recent legislation, and of many suggestions for reform of the local land charges register, has been to increase the number of matters which require registration. Is there not a case for cutting down the number of registers and the entries required to be made therein and substituting instead a statutory obligation of disclosure upon the vendor? The maintenance of any register costs money and takes up the activities of staff who could be more profitably engaged. The number of entries against properties in relation to the total number of properties for which the register is kept is not high. In perhaps nine cases out of ten an official search reveals no subsisting entries except in relation to matters such as building lines. These appear to be properly registrable because they lie only within the knowledge of the local authority and may be imposed without specific notice to the owner of the property affected. In the case of many other rare matters, such as tree or building preservation orders, the extra degree of protection afforded by the costly machinery of registration and searches might hardly be considered justified as compared with a simple obligation to disclose placed by statute upon the vendor.

The Wording of Development Permissions

Crisp from the Fens, Ltd. v. *Rutland County Council*, reported at p. 632, *ante*, is a case of some importance to local planning authorities and developers. In that case a planning permission had been granted to a potato crisp company to manufacture potato crisps at certain premises on condition that the use of their premises was to be confined "to the manufacture of potato crisps or any use within Class III of the Town and Country Planning (Use Classes) Order, 1948." It was held by a majority in the Divisional Court that this only permitted the carrying on of light industrial purposes. In other words, the crisp company could operate only if there was to be no detriment to amenity by reason of noise, vibration, smell, etc.

The county council, in wording their permission, had no doubt in mind the terms of the Minister's circular No. 42 of 12th May, 1948. It is there suggested that local planning authorities will find it convenient to grant permission by reference to the Use Classes Order. The Minister's model of a permission for a change of use (the position in the potato crisp case) runs "the change of use of a building situated at X to any of the purposes specified in Class IX of the Town and Country Planning (Use Classes) Order, 1948, other than" (here follow some random exceptions).

Although this method of wording permissions will not usually lead to difficulty, it does seem that its employment in connection with permissions for light industrial uses may lead to difficulty more often than not. A light industrial use is so defined as to bring in the incalculable element of detriment to amenity, a subject upon which there may be more opinions than one. From the applicant's point of view is it fair to say: "Yes, your application is granted, provided that the processes eventually carried on are such that they could be carried on in any residential area without detriment to the amenity of that area by noise, vibration, smell, fumes, smoke, soot, ash, dust or grit"? It is true that the applicant will usually know more about his proposed processes than the planning authority. On the other hand, there are bound to be borderline cases; the applicant can hardly afford to set up his factory and put the matter to a practical test. There seem, therefore, to be some good reasons for local planning authorities taking upon themselves the difficult task of giving a straight "Yes" or "No" in cases of this sort. It cannot

be good for the prestige of planning in the eyes of the public if planning permissions have to be scrutinised by a lawyer before they can safely be acted upon.

SUPERANNUATION—INTERCHANGE

The Minister of Health has recently made four sets of rules under the Superannuation (Miscellaneous Provisions) Act, 1948, dealing with the interchange of staffs from one branch of the public service to another, and circular No. 74/49 has been issued in explanation. In two cases solicitors may themselves benefit from the rules. Under the Superannuation (Local Government and Colonial Service) Interchange Rules, 1949, transfer to pensionable employment in the colonial service from local government will not normally mean the loss of accrued pension rights under the local government pension scheme. Again, under the Superannuation (Local Government and Public Boards) Interchange Rules, 1949, there is to be full integration of service on transfer between local government and the British Electricity Authority (including area boards) and any other public or semi-public body designated subsequently by the Minister. In the case of the colonial service, local government pension rights are merely preserved "in cold storage"; under the Public Boards Interchange Rules, a transfer value becomes payable in much the same way as a transfer between one local authority and another. With certain provisos both rules apply retrospectively to 4th February, 1948. This will assist many solicitors who have already transferred to the Electricity Authority since that date.

The other rules made are the Superannuation (Local Government Social Workers and Health Education Staff) Interchange Rules, 1949, and the National Insurance (Modification of Local Government Superannuation Schemes) (Amendment No. 2) Regulations, 1949. J. K. B.

A Conveyancer's Diary

BEQUESTS TO NATIONALISED HOSPITALS—II

I CONCLUDED this "Diary" last week with the observation that s. 59 of the National Health Service Act, 1946, covers the destination of any gift to a named hospital, whether testamentary or *inter vivos*, made after the appointed day. That, I think, is one of the effects of the section, but as the section does not say so in terms, and as its provisions appear to have given rise to some uncertainty among practitioners, an examination of its language against the background of the general administrative scheme set up by the Act for the continuation of the work hitherto carried on by a multitude of independent voluntary hospitals up and down the country may be of some assistance.

Section 59 (1) of the Act, to which reference was made in this journal at p. 170, *ante*, provides that "a Regional Hospital Board and the Board of Governors of any teaching hospital and a Hospital Management Committee shall have power to accept, hold and administer any property upon trust for purposes relating to hospital services or to the functions of the Board or Committee under Pt. II of [the] Act with respect to research," and s. 59 (2) provides that certain mortmain provisions shall not have effect with respect to any assurance to any such board or committee either of land or of personal estate to be laid out in the purchase of land. The effect of these provisions on a gift made after the appointed day to a hospital which has been designated as a teaching hospital before the date on which the gift takes effect is this: such a hospital retains its individuality to a considerable extent despite the Act, whether its old charter is repealed by the Minister under the powers conferred upon him by s. 77 of the Act or not, and s. 59 (1) merely makes it clear that the new board of governors, created by the Act in substitution for the old board set up under the pre-existing constitution of the hospital, is enabled to accept a gift made to the hospital, and to hold and administer the property comprised in the gift "for purposes relating to hospital services." Section 59 does not contain a provision, such as is to be found in s. 7 (2), to the effect that property accepted by the relevant body under the powers it confers is to be held free of any trust, and there is therefore no restriction, so far as this Act is concerned, on the donor's liberty to limit the purposes for which his bounty is to be used. For example, a bequest to the board of governors of a named teaching hospital upon trust to apply it for the benefit of a limited class of patients, such as children under a given age, would seem to be perfectly good, and if the gift is accepted, the governors would be bound to apply it for the purposes specified by the donor.

But most of the voluntary hospitals transferred to the Minister or "nationalised" by the Act are non-teaching hospitals, and the management of these hospitals is now vested in hospital management committees set up under s. 11 of the Act. The duty of these committees is the management either of a single hospital or of a group of hospitals, and, speaking very broadly, their functions of management are supervised by a number of regional hospital boards, which also owe their existence to s. 11 of the Act. Thus the Barchester City Infirmary may either have a hospital management committee of its own, or it may be grouped with other hospitals in the vicinity and placed under a management committee charged with the management of the whole group, and in either case above the hospital management committee will be a regional hospital board. Either the committee or the board is empowered by s. 59 (1) to accept gifts to the infirmary, that clearly being a purpose relating to hospital services, and accordingly the donor has the choice, when it comes to drawing the form in which the gift is to be made, of making his gift either to the appropriate hospital management committee or regional hospital board for the purposes of the Barchester City Infirmary, or to the infirmary direct, and in either case, if that is his desire, specifying any particular purpose for which he wishes the gift to be used (e.g., "for the benefit of the children's ward").

The destination of gifts made to hospital management committees and regional hospital boards is expressly provided for by s. 59 (1), but that to a named hospital is governed by the perfectly general principle that a gift to a named institution is construed and takes effect as a gift to the association of persons, however constituted, in control of the institution, provided that there is nothing either in the nature of the gift or in the constitution of the association to prevent such a result. Section 59 (1) now fulfils in the case of gifts to a named nationalised hospital the purpose which the direction to a trustee to accept the receipt of an official of the donee institution does in the case of gifts to other institutions. And in this respect there would appear to be no difference between the teaching and the non-teaching hospital.

Before leaving the question of gifts made after the appointed day to nationalised hospitals there is one final consideration which requires the attention of those concerned in settling a gift of this description. Until s. 59 has been construed by the court its precise effect must remain in some degree a matter of conjecture, and it is therefore advisable, wherever possible, to follow the form of bequest preferred by the hospital which the donor intends to benefit, and in particular to ascertain before a gift is made whether any trust subject to which it is intended to make it will be accepted by the donee body, whatever that may be.

If s. 60 covers a gift made before the appointed day, such as arose in *Re Kellner's Will Trusts* [1949] Ch. 509, and p. 710, *ante* (with which may be compared the decision in *Re Gartside* [1949] 2 All E.R. 546), and s. 59 a gift made after the

appointed day, there is still another circumstance which appears to be covered neither by these provisions nor by any other section of the Act. That is a gift contained in a will made before the appointed day of a testator who dies after the appointed day in favour of a hospital transferred to the Minister by the Act. There is a good deal to be said for the view that such a gift lapses, on the principle adopted in the line of cases of which *Re Rymer* [1895] 1 Ch. 19 is a typical example, the reason advanced in support of this view being that the testator had it in his mind to benefit an institution of a certain character, and that character changed on the appointed day by the loss of the institution's status as a private voluntary organisation. The applicability of the decision in *Re Rymer* is usually countered in argument by the citation of *Re Faraker* [1912] 2 Ch. 488, which is authority for the proposition that so long as there are funds held in trust for the purposes of a charity, the charity continues in existence and is not destroyed by any alteration in its constitution or objects (see *Re Lucas* [1948] Ch. 424, 426). But before the decision in *Re Faraker* can be brought in to assist in the determination of the question, it must be demonstrated that the institution which it is sought to benefit is a charity. Can that be predicated with certainty of the publicly owned and publicly financed institution into which the Act of 1946 has transformed most of the voluntary hospitals in the country? But that is another question, and my only object in mentioning it here to-day is to prevent any misconception arising as to the possible application of s. 59 to gifts made by wills dated before the appointed day of testators who die after that day. Testators still living who have made such gifts by will should confirm them by codicil if they wish to spare their personal representatives and trustees unnecessary trouble.

"A B C"

Landlord and Tenant Notebook

"LET" AND "LET AS A DWELLING-HOUSE"

Two cases noted in our issue of 26th November—*Minns* v. *Moore and Another* (1949), 93 SOL. J. 741 (C.A.), and *Green and Another* v. *Coggins* (1949), 93 SOL. J. 741 (C.A.)—illustrate the difficulties which may still arise in determining the scope of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939.

Section 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, made that statute applicable to "a house or a part of a house let as a separate dwelling . . ." Section 16 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, provided that in that enactment "dwelling-house" should have the same meaning as in the principal Acts, "that is to say, a house let as a separate dwelling or a part of a house being a part so let"; a clarification which gave rise to the *Neale* v. *del Soto* [1945] 1 K.B. 144 (C.A.) series of decisions, and eventually led to the distinctions drawn by ss. 7 and 8 of the Landlord and Tenant (Rent Control) Act, 1949.

"Let as a separate dwelling": In one of the recent cases the importance of the first of these five words came under discussion, in the other the last.

Minns v. *Moore* was an action to recover alleged excess of price paid for furniture, on the granting of a tenancy, over its reasonable price. The action was brought under s. 9 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, since repealed and replaced by s. 3 of the Landlord and Tenant (Rent Control) Act, 1949. The old enactment ran: "Where the purchase of any furniture . . . is required as a condition of the grant . . . of a tenancy . . . of *a dwelling-house to which the principal Act applies* . . ."

The facts were that the defendants had let the plaintiff a flat in 1947, stipulating that the plaintiff should buy certain furniture at a price which was found to exceed what was reasonable by £585. The letting was the first ever, and the defence contended that the subsection did not avail the plaintiff because the purchase had not been required as a condition of the grant of a dwelling-house to which the Acts applied, which, according to the enactments cited in my opening paragraph, meant a house *let*.

Upholding the judgment which the county court judge had delivered in favour of the plaintiff, the Court of Appeal pointed out that if the defendants' contention was sound, the subsection might well fail to achieve anything in cases in which the property concerned had been let before. For at the date of the making of the requirement which gave rise to the cause of action, the house would in many cases be properly described as not let. Apart from which, the subsection obviously contemplated a transaction as a whole, rather than a series of events as a result of which the house became a house let as a separate dwelling.

The 1949 Act, incidentally, anticipates such problems by providing in s. 3 (3): "this section applies to any tenancy of a dwelling-house, being a tenancy to which the principal Acts apply, such that *when the dwelling-house is let under the tenancy* it is a dwelling-house to which the principal Acts apply." It would still be possible to attempt to split hairs by contending that there can be no tenancy for the section to apply to till the dwelling-house is let, but *Minns* v. *Moore* distinctly discourages such sophistry.

Green v. *Coggins* dealt with what happens when one man has two dwelling-houses: *Langford Property Co., Ltd.* v. *Tureman* (1948), 92 SOL. J. 602; 64 T.L.R. 517 (C.A.), discussed in the "Notebook" at 92 SOL. J. 571, decided that protection was not necessarily lost. In that case, however, which the court described as a border-line one, the two properties concerned were dwellings and nothing else; the position in *Green* v. *Coggins* was that the defendant in an action for possession used the ground floor of the premises claimed as an assembly hall plus café and slept about two nights a week in one of three upper rooms, the occasions being those on which late dancing went on in the assembly hall. Earlier in his tenancy he and his family had lived in the three rooms, but in 1946 he had bought a house half a mile away and made it his home.

These facts invited reference to the special provision introduced by the Increase of Rent, etc., Restrictions Act, 1920, s. 12 (2) (ii): "The application of this Act to any house shall not be excluded by reason only that part of the premises is used for . . . business, trade or professional purposes." Section 3 (3) of the Rent, etc., Restrictions Act, 1939, is to the same effect. The decision appears to throw new light on the old question of "dominant user" as a test.

The proposition that dominant user decided whether premises were a dwelling-house or not was rejected by the Court of Appeal in *Epsom Grand Stand Association* v. *Clarke* (1919), 63 SOL. J. 642 (C.A.), the following passage from the judgment of Bankes, L.J., indicating the *ratio*: "The defendant and his family and servants continually lived on the premises and their residence was in accordance with the terms of the agreement. Was this a dwelling-house? The house was dwelt in, and it was let to the defendant for that purpose. In the fullest sense it was a dwelling-house, and none the less so because it was also a public house." Soon afterwards, *Callaghan* v. *Bristowe* (1920), 89 L.J.K.B. 817, applied this to a garage plus living-rooms property: "dual purpose" letting. The special provision was presumably inserted to endorse this view, which was criticised "with the deepest respect" by McCardie, J., in *Waller* v. *Thomas* [1921] 1 K.B. 541, but, of course, loyally followed. That case concerned licensed premises, as did *W. H. Brakspear and Sons, Ltd.* v. *Barton* [1924] 2 K.B. 88 (fifteen bedrooms and usual coffee and smoke rooms, bars, kitchens and appurtenances), in which McCardie, J., again expressed

his preference for a "dominant user" test and regretfully held that the premises were controlled. *Hicks* v. *Snook* (1929), 73 SOL. J. 43 (C.A.), chiefly deserves mention because the Court of Appeal held that the question was one of law, but again emphasised the "purpose of letting" element. In *Vickery* v. *Martin* [1944] K.B. 679 (C.A.), the landlord condoned the use of premises as a guest house in breach of covenant; the tenant, who always used three rooms, but not the same three rooms, for her own exclusive occupation as a residence, was held to be protected: the house, Lord Greene, M.R., put it, was her home. In *Macmillan and Co., Ltd.* v. *Rees* [1946] 1 All E.R. 675 (C.A.), however, the suggestion that permission to sleep in offices made them a dwelling-house was negatived. Lastly, the importance of contemplated as opposed to actual user was again emphasised in *Wolfe* v. *Hogan* [1949] 1 All E.R. 570 (C.A.), in somewhat similar circumstances.

The facts of *Green* v. *Coggins* could not be described as absolutely on all fours with any of the above: the defendant and his family did not live on the premises, he was not there continually, they were not his home, there was no covenant. There was, however, some ground for saying that residence was visualised by the parties when the premises were let; and one of two important points made in Somervell, L.J.'s judgment was that the county court judge had rightly taken into account the fact that residence was originally contemplated; the burden was on the landlords to show that the present use was not the original use which, of course, would protect the defendant. The other point is more interesting, in that it may be said to modify, though not to dispose of, what has been considered to be the orthodox view on dominant user.

Apart from McCardie, J.'s expressions of regret and reluctance, there is a recorded *dictum* of Lush, J., in *Callaghan* v. *Bristowe*, *supra*, who commented on *Epsom Grand Stand Association, Ltd.* v. *Clarke*, *supra*, in these terms: "That is one case, but there are others in which no one could say that the premises were let as a dwelling-house, e.g., that of a large warehouse containing a couple of rooms only with a small room for a caretaker. Plainly, such premises would not be let as a dwelling-house." In *Green* v. *Coggins*, Somervell, L.J., while upholding the judgment of the court below, said that a case could be imagined where the part used as a shop or offices was so large compared with that used as a dwelling-house that it could not be said that the words of s. 12 (2) (ii) of the 1920 Act applied. Thus, a consideration of ratio may now be said to have been introduced; and while the law still is that dominant user is not *the* test, so that mere evidence that user is 51 per cent. business user as contemplated would decide the issue in favour of the landlord, yet the question "how dominant?" is, as Lush, J., suggested, a valid consideration. If an analogy might be drawn between what happens on land and what happens at sea, one might recall that there are passenger vessels which take some cargo, and cargo vessels which take a few passengers, in each case regularly; but there are also cargo vessels which occasionally take a single passenger, and the circumstances visualised by Lush, J., and Somervell, L.J., would be comparable to those of the last-mentioned type of vessel.

R. B.

HERE AND THERE

MORE ABOUT THE J.P.'s

THE House of Commons continues with its work of moulding the future shape of Justices of the Peace and the picture of the new magistrate gradually emerges from the reports of the proceedings. He will not be reimbursed loss of pay incurred through attending to his magisterial duties. He will not be seventy-five years old or more. As to the first, the Home Secretary thought that payment, even within the modest limits of £1 a day for two days a week, would lay assiduous attenders open to the slurs of the ill-natured and ill-disposed. As to the second, member after member belonging to the more advanced age groups rose to offer themselves as living examples of vitality and faculties in a perfect state of unfossilised preservation. But it was felt that the rigid age limit was less invidious than any other and that it would be putting an altogether impossible burden on the Lord Chancellor to require him on fit and proper occasions to write to the riper members of the magistracy: "Dear Sir, In my opinion you are now senile and your name must be put on a supplemental list." No doubt that is wise, but nature draws no deadline. The Dewsbury magistrates not so very many years ago elected a chairman of ninety-one in succession to a stripling of seventy-eight. In the upper regions of the law the question of age limit is one which has always been approached with the utmost wariness and diffidence, for senility appears to be a condition unknown to the sages of the law. Lord Simon, born in 1873, does not wear glasses and seems unlikely ever to need them. He broadcasts (this week he talks in the Third Programme on The Office of Lord Chancellor). In the legal and political discussions in the Lords his mind has lost nothing of its clarity. Humphreys, J., born in 1867, senior judge of the King's Bench Division, and the oldest among his colleagues, is not less remarkable. The time that separates him from his first youth may be visualised from the fact that he learnt to ride a bicycle on one of those fabulous "penny-farthings." Yet who shall say that his grip of the acid bath murder case at Lewes this year was not as firm as ever before?

SAVING THE RECORDERS

THE problem of the condemned recorderships proved a sore enough point for the Government to solace local pride and patriotism with a compromise or concession. The Attorney-General agreed to reduce from 50,000 to 35,000 the qualifying figure of population for county boroughs and non-county boroughs for securing a separate Commission of the Peace. Sir Hartley's own recordership, that of Kingston, the "sugar loaf" borough (for that is the form his remuneration would take if we were out of the wood of austerity), has a population of 40,000. Reacting against the somewhat mechanistic test, depending solely and arbitrarily on a population figure, members showed some interest in an amendment to provide that separate Commissions of the Peace should be retained where in the Lord Chancellor's opinion it was necessary for geographical or historical reasons or to secure the better administration of justice. As this involved no painful personal pronouncements, it was not thought to impose an invidious burden on the Lord Chancellor, and the Attorney-General accepted it in principle, though not necessarily in its exact terms, albeit he uttered a warning that when the criteria necessary for the exercise of the discretion had been established there would be no question of exercising it as a matter of course and in every case. So small but ambitious boroughs will still be pushed by the incentive to raise their birth-rate and win a Recorder.

CHEMISTS' DELIGHT

EVEN the obscurest case may have its brighter moments. For many days the Appellate Committee of the Lords have been threading their way through the technical mazes of an appeal in a particularly complicated patent action arising out of claims to a chemo-therapeutic invention. The relevant words are mostly half a line long. A coloured diagram of frightening proportions is said to be only an abbreviation since, if drawn at full length, it would stretch from the Law Courts to St. Paul's. Yet what fascinating glimpses of another side of life have emerged from a reading of the transcript of the evidence below: "There are a number of species of bacteria, my lord, and they vary to some extent in their mode of life and in the food that they require . . . They are complicated bodies whose fundamental chemical structure is not really greatly different from our own." "You have this germ and it is wanting to eat some para-aminobenzoic acid. Para-aminobenzene sulphonamides are very much like para-aminobenzoic acid, so that the germ makes a mistake and is prepared to eat them instead. It could not eat anything very much different . . . but they are so much alike that it can eat that one without being poisoned . . . It does not really poison them but it is an unsatisfying foodstuff so that the germs cannot survive on it." (Is there a thought here for the Ministry of Food to reflect on?) Or here's a glimpse of an eminent experimental pathologist out of the laboratory. "Q. Your position . . . was rather like that of a fly fisherman who tests flies which are made up for him by a tackle-maker? . . . If you were doing that you would receive flies from the tackle-maker and would try them out on the trout. I do not know whether you have ever

done that but I believe you are a great fisherman and that is the sort of thing that great fishermen are asked to do. Now you would not consider the flies of any use unless you rose or caught a trout with them?—A. I think that would be a little unfair, would not it, because the catching of the trout depends as much upon the technique of using it as on the fly itself. Similarly, in my work, the trout or the result will depend as much upon the technique with which it is conducted, or, at any rate, in part." But these are just the lighter frills; the bulk of the discussion is on the level of "sulphamethylthiazole" and all that, which is hard on the shorthand writers, who are paid by wordage.

RICHARD ROE.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of THE SOLICITORS' JOURNAL*]*

Courts Emergency Powers Act, 1943

Sir,—I feel sure that many other practising solicitors will share my sentiments so far as concerns the illogicality of retaining the provisions of the above Act in relation to court proceedings.

The section of the Act which I feel it is high time was revoked is that relating to counter notices thereunder.

The measure was only a war-time one, and the necessity for retaining it has long since passed. It is very irksome and annoying to the profession when such notices are filed by defendants automatically and can have no validity or bearing on contracts which have been formulated long after the cessation of war. Apart from that irrefutable fact it hinders the process and operation of the law very often to the serious detriment of plaintiffs in common law actions.

Newcastle on Tyne. S. MICKLER.

The Failure of the Town and Country Planning Act, 1947

Sir,—I read with interest the article on p. 748 which brings out some of the failures. Are not the results, however, what were wanted by the promoters of this legislation? There is widespread indignation that this Act has done so much harm in hindering the erection of the type of houses which was really required. The council houses lack varied designs, have little garden space and have not added to the charm of this country.

The mass of literature upon which many people spend so much of their ill-spared time to endeavour to understand adds further to the complexities of those interested in planning and erection of good houses. There is only one thing to do and that is to repeal the Act with some of the other restrictive legislation and then the builders will be able to proceed with proposals for erection of attractive houses.

Sheringham. A. E. HAMLIN.

SOCIETIES

The Mayor of Blackburn, Councillor R. H. G. Horne, had the distinction of being present at the BLACKBURN INCORPORATED LAW ASSOCIATION's dinner on Friday night, 2nd December, as both host and guest. As he is in practice as a solicitor, he attended as a member of the Association and also as mayor. It is about thirty years since a similar event happened in Blackburn—a member acting in a dual capacity. Others attending included the Association's President, Mr. C. S. Robinson, town clerk of Blackburn; two High Court judges, Sir A. G. Willmer and Sir J. W. Morris; and the Commissioner of Assize, Sir R. T. Sharpe, K.C.

In Gray's Inn Common Room at 7.15 p.m. on Monday, 5th December, 1949, the UNITED LAW SOCIETY debated the motion "That the atom bomb should never have been dropped." The opener was Mr. C. Hardinge Pritchard, who said that the use of the bomb was morally unjustifiable and politically unwise; whilst as an act of military expediency the ends did not justify the means. Mr. G. B. Burke opposed the motion on the grounds that the use of the bomb was timely and brought a cheap and speedy end to the war. The motion was lost by 7 votes to 9 with 5 abstentions.

THE LAW SOCIETY have announced that a series of lectures will be given to members of The Law Society and articled and managing clerks of members at The Law Society's Hall, during January to March, 1950, as follows: Wednesday, 25th January, 1950, and Wednesday, 1st February, 1950, two lectures: "Professional Practice and Etiquette," by Mr. T. G. Lund, C.B.E., Secretary, The Law Society; Wednesday, 8th February, 1950, and Wednesday, 15th February, 1950, two lectures: "Advocacy," by Mr. S. C. T. Littlewood, formerly President, The Justices' Clerks' Society; Wednesday, 22nd February, 1950, and Wednesday, 1st March, 1950, two lectures: "Rating and Valuation," by Mr. D. T. Griffiths, O.B.E., town clerk of Southwark. All lectures will be from 5 p.m. to 6.30 p.m. Entry fee for the series, one guinea; for two lectures, 8s. Admission by ticket only.

BOOKS RECEIVED

Encyclopædia of the Law of Planning, Compulsory Purchase and Compensation. In two volumes. General Editor: E. J. RIMMER, B.Sc., A.M.Inst.C.E., Barrister at-Law. Managing Editor: JOHN BURKE, Barrister-at-Law. **Vol. 2, Compulsory Purchase and Compensation.** By R. D. STEWART-BROWN, M.A., Barrister-at-Law. 1949. pp. xxxix, 1027 and (Index) 20. London: Sweet & Maxwell, Ltd. £6 16s. 6d. net, for two volumes. Supplementary service, £1 11s. 6d. per annum.

Voluntary Liquidation. By A. C. HOOPER, Solicitor and Notary. Third Edition. By A. C. HOOPER and J. S. NIXON, LL.B., Solicitors and Notaries Public. 1949. pp. xviii and (with Index) 308. London: Gee & Co. (Publishers), Ltd. 42s. net.

Rent Control. By DENNIS LLOYD, M.A., LL.B., of the Inner Temple, Barrister-at-Law, Reader in English Law at the University of London, and JOHN MONTGOMERIE, B.A., of Lincoln's Inn, Barrister-at-Law. 1949. pp. l and (with Index) 454. London: Butterworth & Co. (Publishers), Ltd. 25s. net.

Oyez Practice Notes, No. 17. Taxation Appeals. By S. M. YOUNG, of Gray's Inn, Barrister-at-Law, Assistant Solicitor of Inland Revenue. With a Foreword by TERENCE DONOVAN, K.C., M.P. 1949. pp. 74. London: The Solicitors' Law Stationery Society, Ltd. 5s. net.

Hill and Redman's Complete Law of Landlord and Tenant. Second Cumulative Supplement to the Tenth Edition. By W. J. WILLIAMS, B.A., of Lincoln's Inn, Barrister-at-Law, and Miss M. M. WELLS, M.A. (Cantab.), of Gray's Inn, Barrister-at-Law. 1949. pp. xvi and 96. London: Butterworth and Co. (Publishers), Ltd. 7s. 6d. net.

An Introduction to the Law of Sales of Land for Auctioneers, Estate Agents, Surveyors and others. By RAYMOND WALTON, M.A., B.C.L., of Lincoln's Inn, Barrister-at-Law. 1949. pp. xliv and (with Index) 502. London: The Estates Gazette, Ltd. 35s. net.

Law relating to Hospitals and Kindred Institutions. By S. R. SPELLER, LL.B., of Lincoln's Inn, Barrister-at-Law. Second Edition. 1949. pp. xliii and (with Index) 587. London: H. K. Lewis & Co., Ltd. 42s. net.

Recent Changes affecting the Law of Rent Restriction and Control. By R. E. MEGARRY, M.A., LL.B., Barrister-at-Law. 1949. pp. 18. Reproduced from the *Journal* of The Chartered Auctioneers' and Estate Agents' Institute.

The New Accounting Requirements for Companies. By FRANK H. JONES, F.A.C.C.A., A.C.I.S., Certified Accountant and Chartered Secretary. Fifth Edition. 1949. pp. 27. Stanmore: Berkeley Book Co., Ltd. 2s. 6d. net.

Employer's Liability at Common Law. By JOHN H. MUNKMAN, LL.B., of the Middle Temple and North-Eastern Circuit, Barrister-at-Law. 1949. pp. xxxvi and (with Index) 339. London: Butterworth & Co. (Publishers), Ltd. 21s. net.

Archbold's Pleading, Evidence and Practice in Criminal Cases. Thirty-second Edition. By T. R. FITZWALTER BUTLER, of the Inner Temple and Midland Circuit, Barrister-at-Law, Recorder of Newark, and MARSTON GARSIA, of the Middle Temple and South-Eastern Circuit, Barrister-at-Law. 1949. pp. cxxvii and (with Index) 1,650. London: Sweet and Maxwell, Ltd.; Stevens & Sons, Ltd. 84s. net.

Table of Penalties for Criminal Offences. Prepared by EDWARD CLARKE, Barrister-at-Law. 1949. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. 6d. net.

REVIEWS

Oyez Practice Notes, No. 7: Powers of Attorney. By CHARLES CAPLIN, LL.B., Solicitor of the Supreme Court, assisted by ARNOLD WEXLER, LL.B. 1949. London: The Solicitors' Law Stationery Society, Ltd. 6s. net.

Powers of attorney are among those documents which, more often than not, are required in a hurry. It is accordingly very desirable that the practitioner should be able to turn quickly to a place where he is certain to be able to find all he needs to know to prepare the document. For this reason he will find this booklet of Practice Notes of great assistance and value. The preparation of powers is dealt with in detail under such heads as "Instruction and Drafting," "Execution of Power," "Stamping" and "Custody" while the reminders on when to file and the procedure on filing in the Central Office bring together material which the conveyancer only too often has had to search for among the, to him, unfamiliar pages of "The White Book." In addition to the preparation of powers, their perusal and effect are fully dealt with as well as the liability of donor and donee. The peculiar importance of powers of attorney relating to land is considered in a separate section with particular reference to the position of a purchaser and the investigations and inquiries which he should make and the ways in which the purchaser's position may be improved by careful drafting of the power thereby facilitating the completion of transactions. The form of the execution of deeds by the attorney is a difficult matter and doubtful cases repeatedly occur. It is, therefore, disappointing to find that this aspect of the matter is dismissed in less than a page which summarises what should be done without attempting to consider what is or is not adequate execution. There is, however, sufficient to put the reader upon inquiry the lines of which he may follow in the bibliography with which the booklet concludes. A useful and comprehensive selection of forms is appended.

Payne's Carriage of Goods by Sea. Fifth Edition. By JOHN SAMUEL-GIBBON, M.A., of the Middle Temple, Barrister-at-Law. 1949. London: Butterworth & Co. (Publishers), Ltd. 15s. net.

Although the interval between the publication of the fourth and the present edition of this well-known student's text-book is more than ten years, the editor of the present edition states in his preface that the "changes in the law relating to the Carriage of Goods by Sea since the publication of the fourth edition of this work have been comparatively few." This appears to be an understatement and the modesty of the editor in making this statement is contradicted by the industry and ability with which he has embodied the relevant amendments into his book. A number of important new cases has been decided and at least one Act, viz., the Law Reform (Frustrated Contracts) Act, 1943, has been passed. Mr. Samuel-Gibbon, who is responsible for the fifth edition, has brought the book up to date by including these matters in the context in such a competent and able manner that only a close comparison between the previous and the present edition reveals the result of his labours. The new case law is treated comprehensively and amongst the new cases considered are *Argonaut Navigation Co., Ltd.* v. *Ministry of Food* [1949] 1 All E.R. 160, further the Scottish case *Hill S. S. Co.* v. *Hugo Stinnes, Ltd.* [1941] S.C. 324, and the Privy Council case *Vita Food Products, Incorporated* v. *Unus Shipping Co., Ltd.* [1939] A.C. 277, but no reference could be found to the important case of *Kadel Chajkin, Ltd.* v. *Mitchell Cotts & Co.* [1947] 2 All E.R. 786, where it was held that a bill of lading containing a clause paramount which embodies the Carriage of Goods by Sea Act of a particular country raises a strong presumption that the law of that country is the proper law applicable to the contract of carriage. In the next edition the clause paramount in connection with the conflict of laws will require a detailed analysis. Of the many admirable features for which "Payne's Carriage of Goods by Sea" has been known to law teachers and students for many years, reference shall be made duly to the chapter on Commercial Practice (pp. 1–8), the paragraphs dealing with the passing of the property (pp. 18–20) and the explanation of the effect of a "clean" bill of lading (pp. 73–76). Mr. Samuel-Gibbon has added another interesting and valuable feature, viz., an explanation of the doctrine of frustration as applicable to charterparties, in the light of *Joseph Constantine S. S. Line, Ltd.* v. *Imperial Smelting Corporation, Ltd.* [1942] A.C. 154 and *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.* [1943] A.C. 32. This text-book, now in its thirty-sixth year, continues to be one of the best short introductions to one of the most complicated branches of the law.

The Law of Agricultural Holdings. By W. S. SCAMMELL, M.C., LL.B. (Lond), Solicitor. 1949. London: The Royal Institution of Chartered Surveyors; The Chartered Auctioneers' and Estate Agents' Institute. 25s. net.

This book has been commissioned by the joint publishers, and the author, who is a member of a firm of Bristol solicitors, has produced what is rightly described as "a complete picture of the present law affecting agricultural holdings, or at least a clear pointer as to where that law is to be readily found." For not only are the provisions of the Agricultural Holdings Act, 1948, covered, but so are those of the Agriculture Act, 1947, which deal with guaranteed prices, with smallholdings, with good estate management and good husbandry, and with administration; and when so covering them, the author gives useful summaries of their scope and object, never fails to refer to interpretation sections which can play so decisive a part, and—this will be much appreciated—occasionally quotes authority (such as Lord Halsbury's description of "discretion" in *Sharp* v. *Wakefield* [1891] A.C. 173) which will assist in the interpretation of enactments with which it was not immediately concerned.

The appendices include not only the existing statutory instruments, the addresses of county agricultural executive committees and similar information but also a fine set of precedents, some "official" and others "unofficial." One would have liked to have seen among the latter a form of notice to quit to be used in the case of an ordinary tenancy from year to year, as well as the one provided for the case of a tenancy for a term of years; it would have been interesting to know whether the author considers that "general words" ought to be used in such a case. This, however, is a minor defect and one that may easily be cured on a future occasion.

Readers with strong views on the subject (such as have been much aired recently) may like to be warned that the author has a whole-hearted admiration for county agricultural executive committees; the topic is surely somewhat controversial. He also approves the habit of entrusting to such bodies or similar bodies the task of hearing representations which are to be heard by *a person* appointed by the Minister (of Agriculture and Fisheries), the validity of which does seem open to question.

Rent Restrictions Guide. By LIONEL A. BLUNDELL, LL.M., of Gray's Inn, Barrister-at-Law. Third Edition. 1949. London: Sweet & Maxwell, Ltd.; The Estates Gazette, Ltd. 17s. 6d. net.

Parliament having resumed its habit of adding patches to rent control legislation, every such embellishment of the existing pattern calls for new editions of text-books dealing with this difficult and complex part of the law. The occasion for the new edition of this "Guide" is, of course, the Landlord and Tenant (Rent Control) Act, 1949, the provisions of which have been incorporated, each in its proper place (for the "Guide" is not one of those books which takes the several statutes section by section, a procedure which necessitates a vast amount of cross-referencing) in the text. The process has been carried out with great care but without any sacrifice of the tersity which has been a feature of this work. One of the advantages of this method of treating the subject is that it enables the author to draw attention to points which might otherwise escape the reader's attention, such as the fact that "decontrol" is of two kinds, one lasting and one temporary. The author is also to be commended for resisting the temptation to quote several authorities when one suffices. Such features make the appearance of the third edition a welcome event in the life of the busy practitioner.

Guide to National Insurance. By H. KEAST. 1949. Leigh-on-Sea: The Thames Bank Publishing Co., Ltd. 2s. net.

Within the limits implied in its title, this booklet explains in a competent manner the ramifications of the national insurance scheme. The explanatory leaflets of the Ministry are general in their terms, but the author of this work supplements his statements by references to the Acts and regulations. Considerable detail is included in 70 pages—with index 85. Provided no attempt is made to use it as a substitute for the text of the Acts and regulations, this booklet should prove an invaluable aid to those called upon to advise not only employers and employed persons, but also self-employed persons and non-employed persons.

NOTES OF CASES

COURT OF APPEAL

RENT RESTRICTION: RATES LIABILITY TRANSFERRED TO TENANT

Woodside House (Wimbledon), Ltd. *v.* Hutchinson

Evershed, M.R., Denning, L.J., and Hodson, J.
19th October, 1949

Appeal from Kingston-on-Thames County Court.

The respondent was the statutory tenant at £180 a year of a flat within the Rent Restriction Acts owned by the appellant company, its standard rent being £190 a year. The landlords had never increased the rent as the rates increased. In October, 1946, the landlords notified the tenant by letter that they were transferring the liability for rates to him. The question came before the county court how the rent thereafter payable should be calculated. It was contended for the landlord that, having regard to s. 2 (3) of the Rent, etc., Act, 1920, the proper method of determining the rent payable was to deduct the amount of rates payable in 1939, that was £41, from the standard rent of £190, leaving £149 as the net rent payable by the tenant. By s. 2 (3), "any transfer to a tenant of any . . . liability previously borne by the landlord shall . . . be treated as an alteration of rent . . . Provided that . . . the rent shall not be deemed to be increased where the liability for rates is transferred . . . if a corresponding reduction is made in the rent." It was contended for the tenant that the amount of the rates payable at the time of transfer, that was £61, must be deducted, leaving the rent payable as £129. The county court judge took a third course, holding that "corresponding reduction" in subs. (3) did not mean a fixed reduction but that it was necessary to consider each year and if necessary adjust the rent so that the rent and rates payable by the tenant should amount in the aggregate to £190. The landlords appealed.

EVERSHED, M.R., said that s. 2 (3) meant that, when a landlord made a transfer of the liability to pay rates to the tenant, it was necessary to reduce the rent by a sum equivalent to the rates then payable, and that, when that had been done, the tenant had to bear any increase in rates and enjoyed any reduction. The landlord was left with a net rent which was thereafter entirely unaffected by rates. The result was that in this case the rent was £190 minus £61, leaving a net rent of £129. If the result were that the landlords were left with a maximum rent of £129, they would be suffering a serious and perpetual loss as a result of their error in failing to give in proper form any notice of increase of rent to meet the increase in rates. It was, however, conceded that, although it was no longer open to them to serve a notice in the standard form increasing the standard rent by reference to increases in rates, it was still open to them under the general terms of the Act to bring the rent up to the standard rent if it had fallen below the standard rent. Putting it in figures, the £190 standard rent became now for this purpose a net standard rent of £190 minus £41, namely, £149. So that, though the operation of transfer must, in order to satisfy s. 2 (3), reduce the rent to £129, it was open to the landlords on taking proper steps to bring it up to £149.

DENNING, L.J., and HODSON, J., agreed. Appeal allowed.

APPEARANCES: *L. A. Blundell* (*G. & G. Keith*); *Neil Lawson* (*Edwin Coe & Calder Woods*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law]

LANDLORD AND TENANT ACT, 1927: INTERVIEW BETWEEN REFEREE AND COUNTY COURT JUDGE

Schooley *v.* Nye

Bucknill, Somervell and Denning, L.JJ.
15th November, 1949

Appeal from Brighton County Court.

The appellant, a tenant, claimed under s. 5 of the Landlord and Tenant Act, 1927, a new lease of a garage at Brighton. The referee to whom the matter was referred found that, notwithstanding that most of the business done at the garage was due to its immediate proximity to the Grand and Metropole Hotels, and so must be ignored in assessing the goodwill for loss of which the tenant was entitled to compensation, there was a certain goodwill adherent to the premises and due to the tenant's business activities at the garage; that he was accordingly entitled to a small amount of compensation for loss of that goodwill; that that amount would not compensate him for having to move; and that he was therefore entitled to a new lease. The county court judge, in a judgment whereby he held that there was no net adherent goodwill entitling the tenant to compensation under s. 4, so that he was not entitled to a new lease under s. 5, said: "the referee gave me an opportunity of seeing him, and I asked him whether he thought the suggested goodwill could affect the bargain which a new lessee would make, but I got no answer which assists me."

SOMERVELL, L.J., said that the rules of procedure under the Landlord and Tenant Act, 1927, contemplated that the report of a referee to whom questions arising under ss. 4 and 5 of the Act were referred, should be in writing. The rules also prescribed the procedure for obtaining further reports from a referee and the extent to which the referee was entitled to elucidate a report. It was accordingly most undesirable that methods of communication between the county court judge and the referee should be resorted to other than those which were clearly indicated in the rules. The judge had put to the referee what, it was conceded, was a possible view to take. As it was possible that the attitude taken by the referee in face of the point thus put to him verbally by the judge in the absence of the parties might have influenced the latter in the decision which he had reached, that decision could not stand. The appeal must therefore be allowed.

BUCKNILL and DENNING, L.JJ., agreed. Appeal allowed. Case remitted for rehearing by a High Court judge.

APPEARANCES: *Paull*, K.C., and *Gwyn Rees* (*Cripps, Harries, Hall & Co.*, for *J. E. Dell & Loader*, Brighton); *Salmon*, K.C., and *W. J. Carter* (*Finch, Turner & Tayler*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

CHANCERY DIVISION

WILL: FAILURE OF GIFT: RULE AGAINST PERPETUITIES: ACCRUER CLAUSE

***In re* Hart; Public Trustee *v.* Barclays Bank**

Danckwerts, J. 2nd November, 1949

Adjourned summons.

By a will, dated 16th July, 1923, the testator directed his trustees to appropriate two-sixth parts of his residuary estate to his two stepchildren, and the other four-sixths to his own children. Clause 16 of the will provided: "In the event of failure or determination of the trusts hereinbefore declared . . . my trustees shall hold the trust fund and the income thereof in trust for the persons or person who would at the time of the failure or determination of all the prior trusts hereinbefore declared and contained have been entitled to my personal estate under the statutes for the distribution of the personal estate of intestates if I had died at the time of such failure or determination intestate." The testator, who had no children, died on 8th April, 1927, being survived by his two stepchildren. By virtue of s. 50 of the Administration of Estates Act, 1925, the reference in the will to persons entitled under the statutes of distribution had to be construed as a reference to the persons who would take beneficially on an intestacy under that Act; s. 47 of the Act provided that those persons would take interests contingent upon attaining the age of twenty-one years or marrying under that age.

DANCKWERTS, J., said that (1) the question was in what event cl. 16 of the will was to take effect. Did it mean a total failure of the trusts of the will, i.e., of the two-sixth parts and the other four-sixth parts, or did cl. 16 simply take effect—possibly more than once—upon the failure (which had occurred) as regards the four-sixths and not yet possibly as regards the two-sixths? In his [his lordship's] view it was clear that "failure or determination of all the prior trusts hereinbefore declared" meant total failure of all the trusts declared in respect of the trust fund; (2) in view of the effect of ss. 47 and 50 of the Administration of Estates Act, 1925, a person might be designated under the testator's will to succeed who could not be ascertained and have a vested interest within the time allowed by the rule against perpetuities; consequently the provisions of cl. 16 were void and failed; (3) the will, whilst providing an accruer clause in the event of failure of the two-sixth portion, did not provide an accruer of the four-sixths to the two-sixths in the event of the testator dying without children; there was plainly a hiatus in the will; he [his lordship] thought that in the events which happened he should imply a cross-limitation to carry over the four-sixths as an addition to the two-sixths held upon trust for the stepchildren. *In re Hudson; Hudson* v. *Hudson* (1882), 20 Ch. D. 406, applied.

APPEARANCES: *H. A. Rose, A. H. Droop* (*Wordsworth & Co.*); *E. I. Goulding* and *N. P. M. Elles* (*Ager & Ager*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

KING'S BENCH DIVISION

INCOME TAX: LUMP SUM PAID TO DIRECTOR

Henley *v.* Murray (Inspector of Taxes)

Croom-Johnson, J. 26th October, 1949

Case stated by Income Tax General Commissioners.

The appellant was the managing director of a company in which he had a controlling interest. Under his service agreement he was entitled to a salary of £1,500 a year free of tax, the agreement to continue to 31st March, 1944, and thereafter to be subject to specified notice by either side. On 6th July, 1943, the managing director resigned at the request of the board. He was paid the sum which he would have been paid had he worked under his agreement until 31st March, 1944. He now appealed against the General Commissioners' decision that that sum was subject to income tax under Sched. E to the Income Tax Act, 1918.

CROOM-JOHNSON, J., said that it was argued for the managing director that the sum in question was really compensation for loss of office and so not subject to tax, and that the General Commissioners, in deciding otherwise, had misdirected themselves in law. In his (his lordship's) opinion, however, the nature of this payment was a question of fact. That appeared from Rowlatt, J.'s decision in *Chibbett* v. *Joseph Robinson & Sons* (1924), 9 Tax Cas. 48. In correspondence with the Inspector of Taxes the managing director's accountants had stated that their client had been "paid the amount due under his managing agreement." The evidence appeared to be all one way. The managing director might, no doubt, have made a bargain with the company that he should be paid compensation for loss of office; but he had not done so. Admittedly in other cases other arrangements had resulted in the conclusion that the payment in question was compensation for loss of office. The decision of the Commissioners here was within *Henry* v. *Foster* (1931), 16 Tax Cas. 605. *Hofman* v. *Wadman* (1947), 27 Tax Cas. 192, which was rather closer to this case than some others cited, again showed that the question at issue was one of fact. Appeal dismissed.

APPEARANCES: *King*, K.C., and *Honeyman* (*Capel Cure, Glynn Barton & Co.*); *Selwyn Lloyd* and *Hills* (*Solicitor of Inland Revenue*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

PROBATE, DIVORCE AND ADMIRALTY

DIVISIONAL COURT

CONSTRUCTIVE DESERTION: HUSBAND'S REFUSAL OF INTERCOURSE

Lawrance *v.* Lawrance

Lord Merriman, P., and Ormerod, J. 18th November, 1949

Appeal from Edmonton justices.

The respondent wife, who desired a child, had for some time had cause to complain of the extreme rarity of her husband's sexual approaches to her, intervals of five and even six months occurring between them. In September, 1948, a separation took place because of that trouble. The parties resumed cohabitation on the husband's undertaking to lead a normal married life. He failed to implement the undertaking, whereupon the wife left him in June, 1949. She took out a summons complaining of desertion. The justices made an order in her favour, and the husband now appealed.

LORD MERRIMAN, P., said that in *Baxter* v. *Baxter* [1948] A.C. 274, at p. 290; 92 SOL. J. 25, Viscount Jowitt, L.C., had said: "The proper occasion for considering the subject raised by this appeal [i.e., sexual intercourse with the use of a contraceptive, insisted on by the husband, alleged not to constitute a consummation of the marriage] is when the sexual life of the spouses, and the responsibility of either or both for a childless home, form the background to some other claim for relief." In *Rice* v. *Rice* (1948), 92 SOL. J. 112; 64 T.L.R. 119, that *dictum* was applied by the Divisional Court affirming justices who had held a husband justified in withdrawing from cohabitation with a wife who refused him normal, complete sexual intercourse. The present case came within that principle, and the wife was justified in her action. It was not, however, a case in which the husband's conduct was such that the wife would be justified in refusing to return to him if he were to convey to her that he wished to resume cohabitation as a husband in the full sense of the word.

ORMEROD, J., agreed. Appeal dismissed.

APPEARANCES: *Gordon Friend* (*W. J. Fraser & Son*); *Tudor Evans* (*Avery, Son & Fairbairn*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SURVEY OF THE WEEK

HOUSE OF LORDS

A. PROGRESS OF BILLS

Read First Time:—

India (Consequential Provision) Bill [H.C.] [7th December.
Parliament Square (Improvements) Bill [H.C.] [7th December.
Statute Law Revision Bill [H.L.] [8th December

For further promoting the Revision of the Statute Law by repealing Enactments which have ceased to be in force or have become unnecessary and for facilitating the publication of revised editions of the Statutes.

Read Second Time:—

Armed Forces (Housing Loans) Bill [H.C.] [8th December.
Distribution of German Enemy Property Bill [H.C.] [6th December.
Festival of Britain (Supplementary Provisions) Bill [H.C.] [8th December.

Read Third Time:—

Auxiliary and Reserve Forces Bill [H.C.] [8th December.
Charity of Walter Stanley in West Bromwich Bill [H C.] [8th December.
Electoral Registers Bill [H.C.] [8th December.
Local Government Boundary Commission (Dissolution) Bill [H.C.] [8th December.
Public Works Loans Bill [H.C.] [8th December.
War Damaged Sites Bill [H.C.] [8th December.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read Second Time:—

Air Corporations Bill [H.L.] [9th December.
Election Commissioners Bill [H.L.] [9th December.
Patents Bill [H.L.] [9th December.
Registered Designs Bill [H.L.] [9th December.
Vehicles (Excise) Bill [H.L.] [9th December.

In Committee:—

Justices of the Peace Bill [H.L.] [7th December.

B. DEBATES

The Second Reading debate on the **Justices of the Peace Bill** was continued by Mr. HOLLIS, who appealed to the Government to reconsider the case of the borough quarter sessions. Each town had its own circumstances and its criminal business did not always depend on the number of its population. He hoped there might be a less rigid interpretation of the 20,000 figure. Was it not possible that in some of the small towns there might be combined Recorderships? Turning to the position of justices' clerks' assistants under the Bill, Mr. Hollis said the Home Secretary admitted that that profession was being made less attractive by the new regulations. The Home Secretary held out some hope that The Law Society would do something to help in the training of these assistants, and he (Mr. Hollis) would be interested to know what The Law Society was going to do.

Mr. ROYLE said there was an air of secrecy and even of suspicion surrounding the Advisory Committees. He thought that they should be authorised by statute rather than by custom, and should have secretarial offices where citizens might approach them to make suggestions as to the Commission for the future. He welcomed the proposed rules for training magistrates, but was disappointed that the Bill did not place a limitation on the number of magistrates sitting on a bench. Often in a quite small case there were so many justices present that everyone was embarrassed. He thought stipendiaries' salaries should be charged on the Consolidated Fund. In industrial cities it amounted to a ½d. rate, which was often a serious matter.

Mr. BASIL NEILD said often justices' decisions were of immense importance. An affiliation order, for instance, might mean that a wage earner had to pay £800 over the years, whilst the whole future of some young person might depend on the decision of a juvenile court. He was glad to see proposals for training, but would much prefer to see a justice of the peace a good judge of fact rather than an amateur lawyer. The salary of stipendiaries should be taken off local funds in order that they should be entirely separated from the local authority in the area in which they were sitting. Mr. CORLETT wondered why the Bill had gone to the Lords with a clause (15 (3) (*a*)) protecting justices'

clerks' assistants as completely as they had been protected under the Justices' Clerks Act, 1877, but when it reached the Commons an entirely different clause (20 (3) (*b*)) had been substituted, severely limiting their opportunities. Many such assistants were gravely disquieted at being excluded from the promotion prospects which they had been enjoying these many years. In the big cities they had given no evidence that they were any less fitted for the job than the professionally qualified men. They were saturated in the experience of the courts. The modern treatment of offenders was not learnt from books, but by practice in the courts. He did not see how, under the regulations, sufficient barristers or solicitors could be found for the scheme, and he was afraid that some who would come forward would be those who failed to make a reasonable income in their private practices—the worst type of material for this job. He was sure there had been some pressure from some professional organisation to induce the Lords to redraft the Bill.

Mr. CLEMENT DAVIES was concerned at the disparity in the penalties inflicted by different benches for similar offences, and hence welcomed the proposal of the Roche Committee for getting one clerk to sit in different courts, and, if required to do so, passing on information from one bench to another. He regretted the proposed limitation of the number of justices sitting to hear a case. He thought quarter sessions was a good educative experience for magistrates. [28th November.

On the Motion for the Adjournment, Mr. MAUDE raised the question of **corrective training,** with the object, as he said, of enabling the Under-Secretary of State for Home Affairs to inform the House, and the judiciary—the High Court, chairmen of quarter sessions, and Recorders—of more than was at present known about it. He thought that they should know from the spoken word, and from Hansard, what it was they were sending these people to. The Lord Chief Justice had described it as an extended Borstal treatment, and he hoped a judge would feel that he was not sending people simply to be imprisoned without corrective treatment. Be that as it might, in fact, of 768 men and women sentenced to corrective training, 390 were in fact in local prisons. He was afraid that if the judiciary was not put in possession of the facts the sentences would become more or less automatic. A recent reply of the Home Secretary had shown that of those sentenced to corrective training only a depressingly small fraction were in prisons set aside for the purpose.

Mr. Maude recalled a conference of the judiciary held in the Middle Temple in 1943 which was addressed by Mr. Fox, the Chairman of the Prisons Commission, and in which Mr. Fox had said that the courts might order a prisoner to be treated in this way or that with little knowledge of what the treatment entailed, while the executive carried out the treatment with even less knowledge of what the court had in mind in prescribing it.

Mr. GEORGE BENSON feared that the whole experiment of corrective training would break down under the weight of the sentences passed. There had been something like 900 sentences of corrective training in a few months. At present the Prison Commissioners were capable of dealing with only a fraction of that number. Before the 1948 Act, there were only 32 detainees; since the Act there had been about 300 sentences of preventive detention. The purpose of the House in organising preventive detention had been to keep the serious menace to society in custody. By some curious aberration of the courts those who were now coming into detention were little petty criminals who happened to have a very large number of sentences. It was outrageous to sentence people to long terms of preventive detention unless the conditions in which they were held were vastly different from those of ordinary imprisonment. What was required was intensive research into the whole problem of sentencing and treating delinquents, together with a carefully controlled system of follow up.

Mr. YOUNGER, in replying to the debate, said it might well be that there were misconceptions in various quarters about what was involved in the new system of preventive detention and corrective training. The former was essentially a preventive measure incorporating as much training and reformative treatment as possible. Corrective training was intended to enable the courts to sentence a person who had the requisite number of previous convictions to a period which would be long enough to enable the Commissioners to give him some kind of corrective training instead of being compelled, as in the past, to sentence him for the particular charge of which he stood convicted, which might be too short a term to allow any constructive training to be given. The object of the training was to give a sense of responsibility, especially from the doing of a good day's useful work. Educational facilities were also better, and there was a good deal more free association. Finally, a real attempt was made to get at the root of the trouble and remove it. But the numbers sentenced to corrective training were seriously in excess of the facilities for training available, though it was hoped in the next six months to abso.b into special prisons or wings specially adapted for the purpose all those serving this type of sentence. [2nd December.

When the consideration of the Lords Amendments to the **Married Women (Maintenance) Bill** was resumed, Mr. ASTERLEY JONES said that the promoters of the Bill had decided to ask the House to disagree with a new clause inserted by the Lords and designed to enable wives who were separated by agreement to ask the courts to vary the amount of maintenance provided for in the agreement. After wide consultation it had been decided that the clause was too controversial.

Mr. JULIUS SILVERMAN, in welcoming the deletion, said that a contract for maintenance did not oust the jurisdiction of the court to make an order, but if the proposed new clause *did* change the law then it was a dangerous clause inasmuch as it placed husbands who had committed no matrimonial offence in a perilous position.

Mr. LESLIE HALE thought the clause was bad inasmuch as often the wife was the guilty party, but the husband made her an allowance, and in such cases it would allow her to allege wilful neglect to maintain, and the court would be debarred from considering the circumstances surrounding the making of the agreement.

Mr. JONES next moved agreement with the Lords' deletion of the clause giving a right of appeal in maintenance cases to quarter sessions. He regretted this as he felt it was wrong that the decision of two or three magistrates should be absolutely final on the facts of a case. Magistrates' orders were now often used as a basis in subsequent divorce proceedings and thus had wide consequences, but the Lord Chancellor had said that such an important change in jurisdiction should not be made in a Private Member's Bill. Mr. MARLOWE could not see why this should be so, and Mr. LESLIE HALE agreed with him. There was at present no real right of appeal, and in 99 cases out of 100 where there was not a real sense of injustice one had to advise the party not to appeal at all. Mr. TURNER-SAMUELS also regretted the loss of the clause. Most maintenance cases turned on quite simple issues of fact, not law. Mr. BOYD-CARPENTER said his experience at the Bar had been that in these cases there was hard-sworn but conflicting testimony on each side, which made the task of magistrates extremely difficult. This, coupled with the smallness of the amounts involved, made the case for an appeal to quarter sessions almost overwhelming. [5th December.

C. QUESTIONS

Mr. MCGOVERN asked whether the Attorney-General would introduce legislation to prevent the publishing of interviews with relatives of condemned persons, whereby their guilt was conveyed to the public in spite of the fact that an appeal in the case was still pending. SIR HARTLEY SHAWCROSS replied that under the existing law the courts already had sufficient power to grant a writ of attachment for contempt of court if a publication was calculated to prejudice the administration of justice. [5th December.

Mr. CHUTER EDE stated that in 1938 twelve persons were found guilty at assizes and quarter sessions of offences of cruelty to or neglect of children, and 932 persons were found guilty of such offences at magistrates' courts. The corresponding figures for 1948 were 36 and 1,004. In the first three quarters of 1948 and 1949 the figures were respectively 804 and 642. [8th December.

Mr. AUSTIN asked whether the Home Secretary would extend the conditions of anonymity obtaining in trials in juvenile courts to all trials involving children under sixteen years, and in particular would he forbid the taking of photographs, in view of the publication a fortnight ago of a photograph of a child of twelve who had been acquitted of murder. Mr. CHUTER EDE replied that any extension of the prohibition imposed by the Children and Young Persons Act, 1933, against the publication of pictures or particulars calculated to lead to the identification of any child or young person concerned in proceedings in a juvenile court, would involve legislation, and as at present advised he was not satisfied that such legislation would be justified. The case mentioned by Mr. Austin was a peculiar one in which the magistrates of the juvenile court had decided that the child's name should be released. That was a discretion which rested with them and he did not think that it should be interfered with. [8th December.

Mr. FOSTER asked the Attorney-General whether, since the report on the air crash at Prestwick on 20th October, 1948,

was made to the Minister of Civil Aviation in July, 1949, but not published until 23rd November, 1949, he would give an assurance that the period of limitation would not be pleaded in any civil action which might be brought against the Minister, as the period expired on 20th October, 1949, before the contents of the report could be known to possible claimants. In reply, the ATTORNEY-GENERAL stated that the report, made under the Air Navigation (Investigation of Accidents) Regulations, 1922 to 1935, would not bind a court of law in any civil proceedings or even be admissible in evidence. He would not bind himself in advance that the Crown would in no circumstances rely on its rights under the Public Authorities Protection Act, but he had on previous occasions made plain that the Crown did not rely on that statute unless real prejudice had been caused by the delay. Regard would be had to the point made by Mr. Foster and he had no reason to think that the statute would be pleaded in any proceedings commenced with reasonable expedition. [7th December.

Sir STAFFORD CRIPPS stated that, in addition to the fees mentioned in a reply given by the Under-Secretary of State for War on 21st November last, fees of £106,122 and expenses of £3,431 had been paid to British counsel in connection with the Nuremberg and Tokyo trials. [7th December.

STATUTORY INSTRUMENTS

Blasting (Castings and Other Articles) Special Regulations, 1949. (S.I. 1949 No. 2225.)

Calf Rearing (England, Wales and Northern Ireland) Scheme, 1949. (S.I. 1949 No. 2222.)

Calf Rearing Subsidy (Scotland) Scheme, 1949. (S.I. 1949 No. 2238.)

Coal Mines (Modifications of Precautions against Coal Dust) (Revocation) Order, 1949. (S.I. 1949 No. 2229.)

Control of Engagement (Amendment) Order, 1949. (S.I. 1949 No. 2251.)

This Order extends the principal Order, as amended, to 10th December, 1950.

County Court Fees Order, 1949. (S.I. 1949 No. 2230.)

Dry Cleaning Special Regulations, 1949. (S.I. 1949 No. 2224).

Exchange of Securities Rules, 1949. (S.I. 1949 No. 2247.)

Fire Services (Conditions of Service) (Scotland) (Amendment) (No. 2) Regulations, 1949. (S.I. 1949 No. 2253.)

Fire Services (Discipline) (Scotland) Regulations, 1949 (S.I. 1949 No. 2254.)

Fire Services (Pensionable Employment) (No. 2) Regulations, 1949. (S.I. 1949 No. 2216.)

Folkestone Water Order, 1949. (S.I. 1949 No. 2234.)

Food (Licensing of Wholesalers) Order, 1949. (S.I. 1949 No. 2241.)

Food Rationing (General Licence No. 4) Order, 1949. (S.I. 1949 No. 2246.)

Hair, Bass and Fibre Wages Council (Great Britain) (Constitution) Order, 1949. (S.I. 1949 No. 2223.)

Lace and Woven Curtain Net (Manufacture and Supply) Order, 1949. (S.I. 1949 No. 2249.)

Meat (Rationing) (Amendment No. 4) Order, 1949. (S.I. 1949 No. 2240.)

Pensions Appeal Tribunals (Scotland) (Amendment) Rules, 1949. (S.I. 1949 No. 2239.)

Planning Payments (War Damage) Scheme, 1949 (S.I. 1949 No. 2243.)

This Scheme is made under s. 59 of the Town and Country Planning Act, 1947, and authorises the Central Land Board to make payments of compensation for depreciation in value of war-damaged land in certain cases where the appropriate payment under the War Damage Act, 1943, was a value payment. The cases covered by the scheme are principally those in which the after-damage value of the land was increased (and the value payment therefore reduced—sometimes to nothing) because there was development value in the damaged site which the 1947 Act now prevents the owner from realising.

Retention of Railway Across Highway (Somerset) (No. 2) Order, 1949. (S.I. 1949 No. 2235.)

Draft **Sale of Food** (Weights and Measures: Variation of First Schedule) Regulations, 1949.

Stopping Up of Highways (Essex) (No. 2) Order, 1949. (S.I. 1949 No. 2236.)

Stopping Up of Highways (Lincolnshire—Parts of Kesteven) (No. 6) Order, 1949. (S.I. 1949 No. 2237.)

Stopping Up of Highways (Northamptonshire) (No. 1) Order, 1949. (S.I. 1949 No. 2231.)

Stopping Up of Highways (Warwickshire) (No. 2) Order, 1949. (S.I. 1949 No. 2232.)

Superannuation (Local Government and Public Boards) (Scotland) Interchange Rules, 1949. (S.I. 1949 No. 2252.)

Draft **Supplemental Allowances** (Scottish Scholars at English Universities) (Amendment No. 1) Regulations, 1949.

War Damage (Contribution Liabilities) Regulations, 1949. (S.I. 1949 No. 2233.)

These regulations govern the making of contributions by undertakings concerned under the War Damage (Public Utility Undertakings etc.) Act, 1949.

NOTES AND NEWS

Honours and Appointments

The King has appointed Sir ALFRED HENRY LIONEL LEACH, K.C., to be a Commissioner of Assize on the North-Eastern Circuit.

Sir ARTHUR STRETTELL COMYNS CARR, K.C., has been elected Treasurer of the Honourable Society of Gray's Inn for the year 1950, in succession to The Right Honourable Sir DAVID MAXWELL FYFE, K.C., M.P., who has been elected Vice-Treasurer for the same period.

Mr. W. BARON, solicitor, of King's Lynn and Hunstanton, has been appointed clerk to the King's Lynn magistrates.

Mr. GEORGE R. BULL, town clerk of Durham, has been appointed area secretary under the Legal Aid and Advice Act for the No. 8 area comprising Durham, Northumberland and Cumberland.

The Board of Trade have appointed Mr. ALBERT HENRY WALTERS to be Assistant Official Receiver for the Bankruptcy District of the County Courts of Bristol, Bath, Bridgwater, Cheltenham, Frome, Gloucester, Swindon and Wells; and also for the Bankruptcy District of the County Courts of Exeter, Barnstaple, Taunton and Torquay, with effect from 22nd November, 1949.

Also with effect from 22nd November, 1949, the Board of Trade have appointed Mr. JOHN WESLEY WHEELDON to be an Assistant Official Receiver for the Bankruptcy District of the County Courts of Bradford, Dewsbury, Halifax and Huddersfield, and also for the Bankruptcy District of the County Courts of Leeds, Wakefield, Scarborough, York and Harrogate.

The Lord Chancellor proposes to appoint Mr. A. J. SPARK to be the registrar of the Newcastle-on-Tyne, Morpeth and Blyth county courts and district registrar in the district registry of the High Court of Justice in Newcastle-on-Tyne, as from the 24th December, 1949. Mr. Spark is at present registrar of the Gateshead, Morpeth and Blyth, Consett and North Shields county courts. (*Vice* Mr. A. D. Minton-Senhouse, registrar of the Newcastle-on-Tyne and Hexham county courts and district registrar of the district registry in Newcastle-on-Tyne, who retires on the 23rd December, 1949.)

The Lord Chancellor proposes to appoint Mr. R. COHEN, the registrar of the Stockton-on-Tees, Middlesbrough and Stokesley and Guisborough county courts and district registrar of the Stockton-on-Tees and Middlesbrough district registries, to be, in addition, the registrar of West Hartlepool county court and district registrar in the district registry of the High Court of Justice in West Hartlepool, as from the 24th December, 1949.

Miscellaneous

THE SOLICITORS ACTS, 1932–1941

On the 1st December, 1949, an Order was made by the Disciplinary Committee, constituted under the Solicitors Acts, 1932 to 1941, that the name of STANLEY MORGAN, of Nos. 11 to 13 Cavendish Street, Barrow-in-Furness, in the County of Lancaster, be struck off the Roll of Solicitors of the Supreme Court, and that he do pay to the applicant his costs of and incidental to the application and inquiry.

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